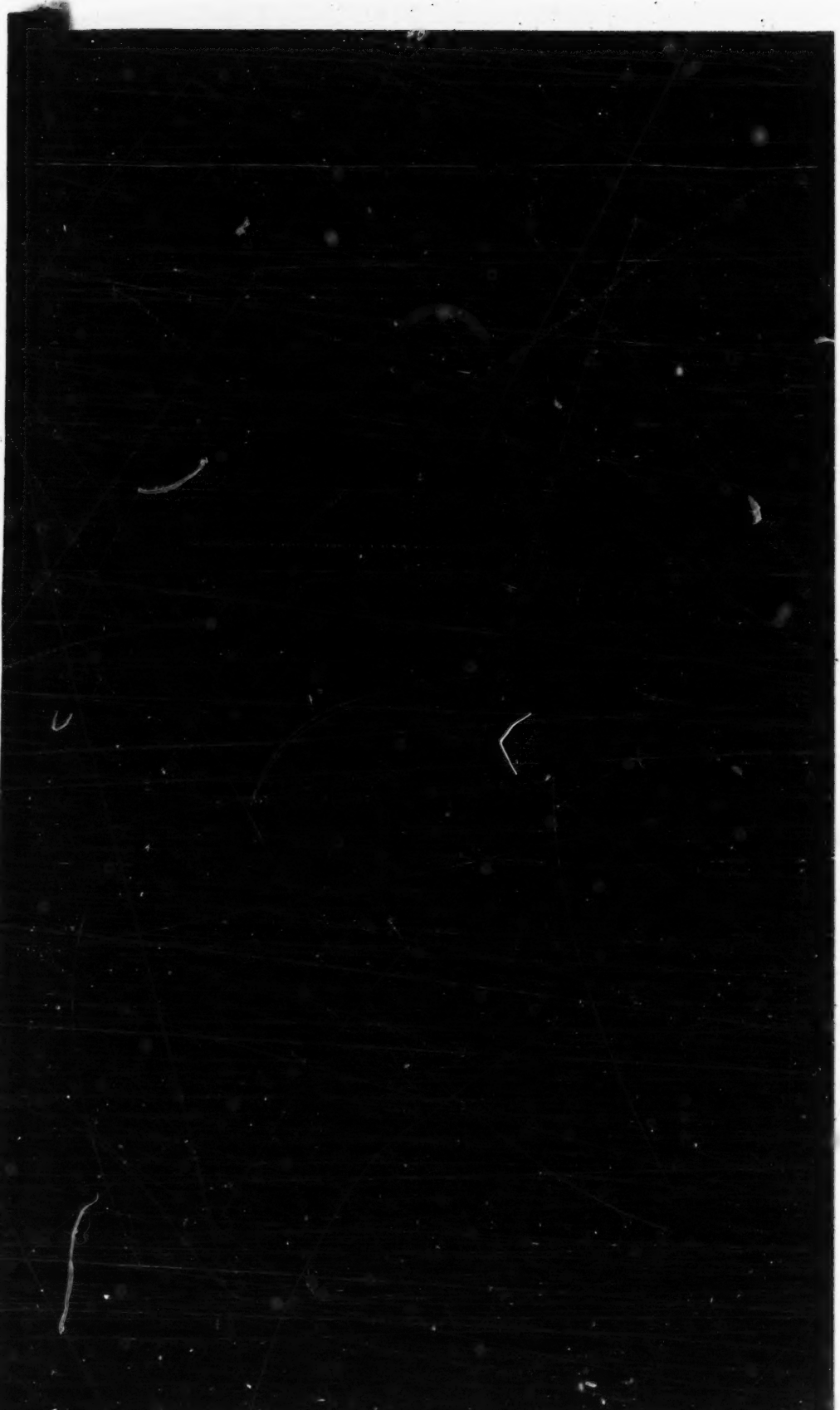

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# In the Supreme Court of the United States

OCTOBER TERM, 1943

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No. 493

CARL WILHELM BAUMGARTNER, PETITIONER

*v.*

UNITED STATES OF AMERICA

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*ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT*

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## BRIEF FOR THE UNITED STATES

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### OPINIONS BELOW

The opinions of the Circuit Court of Appeals (R. 338–351) are reported at 138 F. (2d) 29. The opinion of the District Court (R. 25–27) is reported at 47 F. Supp. 622.

### JURISDICTION

The judgment of the Circuit Court of Appeals was entered on September 11, 1943 (R. 352). The petition for a writ of certiorari was filed November 18, 1943, and was granted January 17, 1944 (R. 352). The jurisdiction of this Court is conferred by Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

## QUESTION PRESENTED

This case presents for decision a question explicitly reserved in *Schneiderman* v. *United States*, 320 U. S. 118, 159, namely, whether a district court, acting pursuant to the authority vested in it by Congress, can properly cancel a certificate of naturalization upon proof that the alien procured citizenship by falsely and fraudulently declaring on oath that he absolutely and entirely renounces all allegiance and fidelity to the country of his origin, and that he will bear true faith and allegiance to the United States.

As presented by the case at bar, the question has two aspects:

1. Whether the concurrent finding of the two courts below that the petitioner's certificate of naturalization was illegally and fraudulently procured is supported by clear, unequivocal, and convincing evidence.

2. Whether cancellation of the petitioner's citizenship was proper under the statute and the Constitution.

## STATUTES INVOLVED

The statutes involved are set forth in the Appendix, *infra*, pp. 60–64.

## STATEMENT

Proceeding under Section 338 of the Nationality Act of 1940 (8 U. S. C. 738), the United States on August 21, 1942, brought suit in the United States District Court for the Western District of Mis-

souri to cancel the certificate of naturalization issued by that court to the petitioner, a native of Germany, on September 26, 1932. The complaint charged that the certificate was fraudulently and illegally procured in that the petitioner falsely swore in his petition for naturalization and in open court that he absolutely and entirely renounced and abjured all allegiance and fidelity to the German Reich; that he would support and defend the Constitution and laws of the United States against all enemies, foreign and domestic; and that he would bear true faith and allegiance to the same (R. 1–4). Attached to the complaint was an affidavit of cause by a special agent of the Federal Bureau of Investigation (R. 4–22). In his answer, the petitioner denied these charges, and affirmatively asserted that he was and had always been attached to the principles of the Constitution, that he had renounced all allegiance to the Reich, and that he had continuously since his naturalization borne true faith and allegiance to the United States without mental reservation or purpose of evasion (R. 22–24).

The evidence, which is set forth more extensively in the Argument, may be briefly summarized here as follows:

The petitioner was born in Kiel, Germany, on January 20, 1895 (R. 145), and came to the United States on February 9, 1927, when he was 32 years old (R. 147). On June 14, 1927, he filed a declaration of intention to become a citizen

(R. 243–244), and on May 16, 1932, he filed a petition for naturalization in the United States District Court for the Western District of Missouri (R. 244–247). The court issued him a certificate of citizenship on September 26, 1932 (R. 251).

In 1914, when he was 19 years old, the petitioner enlisted in the German army where he rose to the rank of Second Lieutenant (R. 148–149). He was captured by the British in 1917, and remained a prisoner of war in England until 1919 (R. 97, 149). He then returned to Germany and studied at the University of Darmstadt, where he received a degree in electrical engineering (R. 150). He was married in Germany on January 20, 1927, and left for the United States about January 27, 1927; his wife joined him here in August or September of that year (R. 147, 239).

After arriving in this country the petitioner visited friends in Illinois for three months, and then settled in Kansas City, Missouri, where he soon obtained a position with the Kansas City Power and Light Company (R. 239). He remained continuously in the employ of that company, and was working there as a laboratory engineer at the time of the trial (R. 239). Immediately after he joined the company, the petitioner began to talk about Germany and its government. At that time, in 1927, he expressed great enthusiasm for the Hitler movement, which

was then still in its early stages (R. 41). His opinion of the superiority of the German people and their institutions was so open and so marked that it was found necessary to transfer him to another department in order to avoid trouble with other employees (R. 41–42).

In the years from 1932, when he began to work in the company's testing laboratory (R. 37), through 1941, the petitioner frequently expressed profound admiration for Hitler (R. 35, 43, 57, 61, 63–64, 65–66, 73, 77, 81, 83, 89, 92, 95, 96), and proclaimed the superiority of the Nazi dictatorship to American democracy (R. 32, 39, 44, 58, 66, 67, 69, 75–76, 78, 83, 84). The evidence adduced at the trial included his conversations and statements in the laboratory (R. 37–40, 58, 59, 83, 85–86), in the Kansas City School of Engineering where he was an instructor (R. 52–54, 89), in his public speeches (R. 70–73, 92, 94, 96, 278), in his church activities (R. 45–46, 73–74, 87–88, 91), in his home and social life (R. 32, 35, 38, 47, 61–62, 64–66, 68–69, 75, 78, 84, 95), and in entries made in a diary which he kept from December 1, 1938, to June 27, 1941 (R. 251–297).

The petitioner stated that he was for Hitler "100 percent" (R. 57); that we "should have a man at the head of this Country to run it like Adolf Hitler"; that Hitler was "one of the finest men in the world" and undoubtedly would some day rule this country (R. 32); that "the day will

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come that Germany will be the dominant war power," and that America would then have to "listen to Hitler" (R. 66); and that he "would be glad to live under the regime of Hitler" (R. 96). He thought that democracy was "a practical farce" (R. 83), and "on the way out" (R. 66). He expressed contempt for "the western democracies", including the United States and the American people (R. 254–255, 262–263, 265, 295, 297), and implied that only "ridiculously primitive and uneducated" persons could "really feel at home in this country" (R. 292).

An American-born citizen of German extraction who expressed opposition to Hitler was "a traitor to my country" (R. 40). He justified the German invasion of Czechoslovakia, Poland, and other countries, as "protection" from England and necessary to German existence (R. 37, 38, 48, 70, 93), and rejoiced at the news of the Allied defeat at Dunkirk (R. 85). In 1937 and 1938 he taught a Sunday School class and his frequent discussions of Germany from a pro-German viewpoint led to complaints that he was preaching Nazi philosophy to the youngsters (R. 45–46, 73–74, 87–88, 91). In a speech before a businessmen's association in April 1938, he praised the accomplishments of the Hitler government (R. 70–72, 92). He expressed a desire that German-Americans be more aggressive in their display of sympathy and loyalty to Germany (R. 260–261,

262, 278), and voiced suspicion and disapproval of loyal Americans of German extraction, some of whom he described as "spies" (R. 259, 261, 264, 268, 274, 279, 288, 292). In 1939 the petitioner's wife and two children went to Germany, where they have since remained (R. 50–51, 63, 95.) He wanted his children "to be brought up in German schools" (R. 51), and reported with satisfaction that his daughter had "done a very un-American thing" when she joined the Nazi Youth Movement in Germany (R. 77–78).

When he drank, he toasted "the welfare and the future of Germany", not the United States (R. 256). He attended meetings which were opened with the singing of the German national anthem, and where, to quote his own words, "everyone naturally arose and assumed the usual German stance with the arm extended to give the National Socialist greeting" (R. 260). He thought "it was the duty of German American citizens to stand up on their two feet and fend off all attacks on Germany" (R. 261). In March 1939, after the German occupation of Czechoslovakia, he stated: "The Jewish-American-English fortress in the heart of Central Europe has fallen. A terrible defeat for the above named powers who will probably have a difficult time recovering from this" (R. 261–262). He used the word "American" as an opprobrious epithet: "It is strange how Mrs. August Eyssell talks about Hit-

ler and Germany—the way most people talk about them here. Even Helen Eyssell, to whom I always thought Germany meant more than just an entertaining place to stay, today made it very evident that she was an 'American' girl" (R. 288). He praised a friend in these terms: "Sachs is a good fellow and a good German who has not been Americanized, that is, ruined" (R. 264).

The petitioner took the stand in his own behalf and, in response to a question by the court, stated that his attitude toward the principles of American government was the same when he took the oath in 1932 as it has been ever since (R. 182–183). He denied having made most of the anti-American, anti-democratic statements attributed to him by the witnesses for the Government (R. 160–165, 191–208), and attempted to explain or retract the various entries in his diary (R. 170–181, 188–189). He professed complete loyalty to the United States and a sincere belief in the democratic form of government. He stated that if he were ordered to do so by the military, he would participate in an invasion of Germany (R. 183).

On the basis of this evidence the district court concluded (R. 25–27) that the petitioner's certificate of citizenship was fraudulently and illegally procured by means of a false oath that he had renounced all fidelity to the German Reich and

that he would bear true faith and allegiance to the Constitution and laws of the United States. The court accordingly directed that its order of September 26, 1932, admitting the petitioner to citizenship in the United States, together with his certificate of naturalization, be cancelled (R. 27). On appeal, the judgment was affirmed by the Circuit Court of Appeals for the Eighth Circuit, with one judge dissenting (R. 338–351).

## SUMMARY OF ARGUMENT

The statute requires, as a condition to an alien's acquisition of citizenship, that he take an oath renouncing absolutely and entirely all allegiance and fidelity to any other state, to support and defend the Constitution and laws of the United States, and to bear true faith and allegiance to the same. The concept of allegiance connotes all of the fidelity and devotion which a nation has a right to expect of its citizens.

Unlike *Schneiderman* v. *United States*, 320 U. S. 118, this case presents no question whether the petitioner behaved during the statutory five-year period as a person attached to the principles of the Constitution, and well disposed to the good order and happiness of the United States. The issue in this case, ineluctably presented by the pleadings and proof, is whether the concurrent finding of the two lower courts that the petitioner's certificate of naturalization was fraudulently

and illegally procured is supported by clear, unequivocal, and convincing evidence; and whether cancellation of his citizenship was proper under the statute and the Constitution.

I

The evidence adduced at the trial convinced the district court that when the petitioner in 1932 swore that he renounced all fidelity to any foreign state, particularly the German Reich, and that he would bear true faith and allegiance to the Constitution and laws of the United States, he then subscribed to principles of National Socialism which were diametrically opposed to and irreconcilable with devotion and fidelity to the principles of freedom and democracy underlying the Constitution and laws of the United States; that his renunciation of all allegiance to the German Reich was not absolute and entire; and that his certificate of citizenship was therefore procured illegally and by fraud. The Government met the burden of proving its case by clear, unequivocal, and convincing evidence. The evidence amply supported the finding that when the petitioner took the oath of allegiance, he retained a devotion and emotional attachment to Germany which was inconsistent with his renunciation of all allegiance to that country. The evidence also showed that he subscribed to doctrines of National Socialism which were incompatible with allegiance and fidelity to the Constitution and laws of the

United States.

Long after the petitioner took the oath of allegiance to the United States his behavior and speech disclosed that he was more loyal and more faithful to Germany than he was to this country. The district court was clearly justified, in the absence of evidence indicating that a change in attitude occurred after naturalization, in concluding that he had never completely renounced all allegiance to Germany. The petitioner consistently manifested a strong sense of loyalty and devotion to Germany, and a contempt for the principles of democracy and individual liberty underlying the Constitution of the United States—feelings which he never renounced and never lost. In these circumstances it was proper to judge the character of his oath of allegiance by the statements he made to others and the sentiments he recorded in his personal diary subsequent to naturalization. These were the expressions of an intelligent, mature man—made not irresponsibly but deliberately, continuously, and persistently over a period of many years, in every phase of his activities, and without variation in theme.

While no single statement made by the petitioner was in itself conclusive proof of his lack of allegiance to the United States, their cumulative effect was highly significant. Considered as a whole, the evidence clearly showed that his entire mode of thought, his interests and his judgments, and his emotional attachments, were colored by

his devotion and fidelity to Germany; that at heart he had not fully renounced all loyalty and allegiance to the German Reich. Long after he had taken the oath to bear true faith and allegiance to the United States, the persistent emphasis of his thoughts and words was upon the superiority of the German people, their form of government, and their institutions. It was the constant subject of his conversations with others, apparently being foremost in his mind. He never evinced any concern, any praise, any respect, any love for the United States, and expressed only contempt for the democratic and American system of government.

II

The district court properly directed that the order admitting the petitioner to citizenship, together with his certificate of naturalization, be cancelled. The statute requires, as an express condition to the valid acquisition of citizenship, that an oath be taken renouncing all allegiance and fidelity to any other state. Since the petitioner, when he took such an oath in 1932, did not in fact renounce all allegiance to the German Reich, his citizenship was illegally and fraudulently procured. The statute plainly authorized cancellation of his citizenship on that ground. Neither its language nor legislative history afford a basis for reading an exception into the statute. The decisions of the lower courts are substantially uniform in holding that a false oath of allegiance

vitiates naturalization. These rulings reflect a proper appreciation by the lower courts of the great importance of the oath of allegiance in naturalization proceedings, particularly since 1926.

Cancellation of the petitioner's citizenship is not precluded by the doctrine of *res judicata*, which is inapplicable to the facts of this case. Even in the absence of statutory authorization, courts of equity have always asserted jurisdiction to set aside judgments obtained by fraud. One who fraudulently induces a court to give judgment in his favor cannot invoke the doctrine of *res judicata* for the purpose of preventing the court from setting aside the judgment for fraud. In the present case the issues of fraud and illegality were neither tendered by the Government nor determined by the court in the 1932 naturalization proceeding.

Even prior to the enactment of the Act of 1906 which explicitly conferred jurisdiction in the district courts to cancel judgments of naturalization on the ground of fraud, both federal and state courts had exercised a similar jurisdiction. And the validity of the 1906 Act has repeatedly been upheld in numerous decisions of this Court. To hold the doctrine of *res judicata* applicable here would effectively abolish the remedy of the Government to obtain cancellation of certificates of citizenship procured illegally and by fraud—a remedy plainly regarded by Congress as essential

to the scheme of naturalization adopted in 1926. Congress would thus be compelled to reestablish the old procedure under which the courts were called upon to investigate the facts relating to each petition for naturalization—a procedure which was abandoned as impractical and unsatisfactory.

To cancel the petitioner's citizenship on the ground of fraud or illegality is not to punish him for the expression of unpopular political views. Congress can unquestionably insist upon allegiance as a condition precedent to the grant of citizenship. The test of allegiance necessarily implies that inquiry may be made into convictions of a political character. While Congress could not under the First Amendment proscribe expressions of such attitudes and beliefs, it undoubtedly could make such expressions relevant in determining the fact of allegiance. To test a person's allegiance by inquiry into his expressions relevant to the question of allegiance is not to abridge his constitutional right of free speech.

## ARGUMENT

For almost one hundred and fifty years Congress has required, as a condition to an alien's acquisition of citizenship, that he declare on oath that he absolutely and entirely renounces all allegiance and fidelity to the state of which he was before a subject or citizen; that he will support and defend the Constitution and laws of the United States against all enemies, foreign and

domestic; and that he will bear true faith and allegiance to the same. Sec. 335, Nationality Act of October 14, 1940, c. 876, 54 Stat. 1137 (8 U. S. C. 735); Act of March 26, 1790, c. 3, 1 Stat. 103; Act of Jan. 29, 1795, c. 20, 1 Stat. 414; R. S. § 2165; Act of June 29, 1906, c. 3592, 34 Stat. 596, 598; Act of Oct. 14, 1940, c. 876, 54 Stat. 1137, 1157. "By allegiance is meant the obligation of fidelity and obedience which the individual owes to the government under which he lives, or to his sovereign in return for the protection he receives." *Carlisle* v. *United States*, 16 Wall. 147, 154. The concept of allegiance "connotes the emotional ties which bind the individual to a political group or association and to the symbols which represent it." C. J. Friedrich in *Encyclopedia of the Social Sciences* (1935), vol. I, p. 644. It comprehends all the loyalties and attachments which a nation has a right to expect of its citizens.

The district court found in the present case that in 1932, when the petitioner took such an oath in order to obtain a certificate of naturalization, his "real loyalty" was to the "principles of government then advocated and thereafter put in practice by Adolph Hitler," and that those principles, including government by dictatorship, German racial superiority, and denial of fundamental civil liberties, were "diametrically opposed to those of the United States" (R. 25). Upon such findings, the court held, "only one possible conclusion [is] to be reached," namely, that the "order admitting

Carl Wilhelm Baumgartner to citizenship and the certificate of citizenship granted him were obtained by fraud; they were illegally procured by means of an oath falsely made, that he had renounced all fidelity to The German Reich and that he would bear true faith and allegiance to the Constitution and laws of the United States" (R. 27).

Unlike the basis upon which this Court decided *Schneiderman* v. *United States,* 320 U. S. 118, there is no issue in this case whether the petitioner, during the five years preceding his naturalization, was a person attached to the principles of the Constitution, and well disposed to the good order and happiness of the United States. The complaint here charged that the oath of allegiance taken by the petitioner in 1932 in order to obtain naturalization was false and fraudulent; that when he took the oath, the petitioner did not in fact intend to renounce absolutely and forever all allegiance and fidelity to the German Reich, of which he was then a subject; that he did not then in fact intend to support the Constitution and laws of the United States against all enemies, foreign and domestic; and that he did not then in fact intend to bear true faith and allegiance to the same (R. 2–3). The proof adduced at the trial convinced the district court that the petitioner had obtained naturalization by taking a false and fraudulent oath, and that his certificate of citizenship should therefore be cancelled (R. 25–27).

This finding and conclusion were sustained by the Circuit Court of Appeals (R. 338–351). We submit that the evidence supports the concurrent finding of the two lower courts, and that cancellation of the petitioner's certificate of citizenship was proper under the statute and the Constitution.

## I

### THE CONCURRENT FINDING OF BOTH COURTS BELOW THAT THE PETITIONER'S CERTIFICATE OF NATURALIZATION WAS ILLEGALLY AND FRAUDULENTLY PROCURED IS SUPPORTED BY CLEAR, UNEQUIVOCAL, AND CONVINCING EVIDENCE

The evidence adduced at the trial clearly supports the finding of the district court that when the petitioner in 1932 swore that he renounced all fidelity to any foreign state, particularly to the German Reich, and that he would bear true faith and allegiance to the Constitution and laws of the United States,[1] he then subscribed to principles of National Socialism which were antagonistic to and irreconcilable with devotion and fidelity to the principles of free, democratic government underlying the Constitution and laws of the United States; that his renunciation of all allegiance to the German Reich was not absolute and

[1] Such an oath was required under Section 4 of the Act of June 29, 1906, c. 3592, 34 Stat. 596, formerly 8 U. S. C. 381 (1926 ed.), which was in effect when the petitioner was naturalized. See Appendix, *infra*, p. 61.

entire; and that his certificate of citizenship was therefore illegally procured upon a false and fraudulent oath (R. 25–27). We assume, as did the Circuit Court of Appeals,[*] that the burden rested upon the Government to prove fraud by "evidence of a clear and convincing character." *Schneiderman* v. *United States*, 320 U. S. at 123. We submit that this burden was met by the proof presented by the Government.

As the Circuit Court of Appeals observed, the narrow question of fact before the trial court was "whether appellant's allegiance to this country at the time of his naturalization was unqualified and unconditional, or, stated another way, it is whether his oath of allegiance was made without any mental reservation whatsoever in favor of the country of his origin, the German Reich" (R. 347). Determination of this issue involved an inquiry into the state of the petitioner's mind in 1932, when he took the required oath of allegiance. That the misrepresentation attributed to the petitioner was as to the state of his mind did not make it any the less a misrepresentation of fact: "* * * the state of a man's mind is as much

[*] The opinion of the Circuit Court of Appeals explicitly states: "In an action to vacate a judgment of naturalization on the ground that it was obtained by fraud, the burden is upon the United States to prove the charges of its complaint by evidence which is unequivocal, clear, and convincing" (R. 346). Consequently, the petitioner is in error in implying (Brief, p. 11) that the Circuit Court of Appeals did not apply the rule as to burden of proof established in *Schneiderman* v. *United States*, 320 U. S. 118.

a fact as the state of his digestion. It is true that it is very difficult to prove what the state of a man's mind at a particular time is, but if it can be ascertained it is as much a fact as anything else." Bowen, L. J., in *Edgington* v. *Fitzmaurice*, 29 L. R. Ch. Div. 459, 483 (1885). See *Seven Cases* v. *United States*, 239 U. S. 510, 517–518, and cases cited.

The state of a man's mind at a particular time may conceivably be shown in a variety of ways. Since a court cannot look into the inner recesses of a man's mind, it must necessarily rely upon external manifestations, his words and his deeds. The clearest kind of legal evidence upon such an issue would be his contemporaneous admissions. But proof of this character is available only in the rarest and most exceptional case; it is inconceivable that Congress intended to limit the courts, in denaturalization proceedings based on fraud and illegality, to evidence of such a nature. If this were so, almost every alien who illegally procured citizenship upon the basis of a false representation as to the state of his mind would be enabled to retain citizenship which he never lawfully acquired and to which Congress never intended him to be entitled. For all practical purposes, the statutory requirement that an applicant for citizenship must take an oath of allegiance to the United States would be rendered wholly nugatory, and the oath itself would become an empty, meaningless formality.

In the present case the evidence before the trial court presented a complete picture of the petitioner, his background, his mental and emotional associations, and his outlook on life. The petitioner voluntarily took the stand, and testified at great length.[3] The court had before it the petitioner's personal, intimate thoughts as recorded by him in a private diary. More than thirty witnesses—his colleagues, his friends and acquaintances, his neighbors—testified with regard to views he had expressed. The evidence consisted principally of statements and admissions made subsequent to the taking of the oath of allegiance; but in cases of this character such evidence has special probative force. The oath of allegiance looks to the future; it requires an intention thereafter to bear true faith and allegiance to the United States. Not until the very moment of taking the oath is an applicant required to renounce allegiance to his former sovereign. Consequently, conduct subsequent to the date of naturalization is of great significance in determining the validity of the oath. Cf. *United States* v. *Kramer*, 262 Fed. 395, 397 (C. C. A. 5). Although ordinarily the probative force of later conduct grows weaker with the lapse of time,[4] this

[3] The petitioner was his own principal witness. His testimony (R. 145–230) and diary entries (R. 251–297) cover 131 of the 266 pages in the printed record containing the evidence before the district court (R. 31–297).

[4] See *Luria* v. *United States*, 231 U. S. 9, 27.

is not true with respect to the issue of allegiance. It is reasonable to assume that an adult immigrant who has for years given his allegiance to another state will not, at the time of taking the oath, lose all sentimental attachment to his native country. But it is also reasonable to expect that, if he has intentionally and in good faith transferred his allegiance and fidelity to the United States, his attachment to his native country will grow weaker with time. Loyalty and allegiance to one's country are not feelings which change from day to day. They are matters of slow growth and experience, involving the imponderables of emotional attachments and prejudices. A new citizen's devotion to his adopted land would naturally grow as he acclimates himself, makes friends, and establishes his place in the community. As these ties are intensified, his faith and allegiance to his new country should become stronger. An oath of allegiance, if honestly and sincerely taken, acquires strength and roots.[5]

[5] The analysis made by Judge Cushman in *United States* v. *Herberger*, 272 Fed. 278, 291 (W. D. Wash., 1921), is relevant here:

"Loyalty or allegiance is, necessarily, of slow growth; therefore, somewhat involuntary, not fully subject to the will. Those who lightly, for temporary advantages, undertake to change their allegiance, are liable to overlook the deep-seated nature of this feeling; but the fact that not until afterwards, in times of stress, is it made manifest that the desires, suffered to lie dormant, are stronger for their native than their adopted country, although this fact may not be fully realized at the time of their naturalization, renders it

When, therefore, years after his naturalization, and particularly in a period of strained relations between his native country and the United States, a naturalized citizen is shown to be more loyal and more faithful to the land of his birth than to his adopted country, a court is justified, in the absence of evidence indicating that a change in attitude occurred after naturalization, in concluding that such a person had never fully renounced all allegiance to the country of his origin. This is the rationale of a number of denaturalization

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none the less a legal fraud for the applicant to fail to disclose his true, although latent, feeling in such a matter."

See also the discussion of Judge Bright in *United States* v. *Kuhn*, 49 F. Supp. 407, 412 (S. D. N. Y., 1943):

"* * * each defendant renounced all allegiance and fidelity to his homeland; he agreed to support and defend the Constitution and our laws against all enemies, and his faith and allegiance was to be true. These three requirements preclude any divided concept. They contemplate full and complete citizenship. It is to be expected, of course, that new citizens will not have completely divested themselves of some sentimental feeling for their old country. It is also to be expected that as the years grow longer after their oath that this sentiment will diminish and their love for their adopted land will increase. * * * The test of how strong those sentiments were at the taking of the oath and how much, if at all, they created a mental reservation or purpose of evasion as to any or all parts of the oath, may be presumed from defendants' subsequent actions and statements. Particularly is this so when the real test comes, when war or dispute between their new country and their old, is imminent or declared. If it appears that they then fail in allegiance, fidelity or faith, it may fairly be presumed that they did not absolutely and entirely renounce their former allegiance, and this presumption is all the stronger when the period which has elapsed since the oath is longer."

cases arising during World War I.[6] It has been reaffirmed in numerous recent decisions of the lower courts.[7]

We submit that this rationale is sound and applicable to the facts of the present case. There was no evidence of any change in the petitioner's attitude subsequent to his naturalization.[8] The petitioner made no contention that his mental attitude when he was naturalized in 1932 was not the same as it was in later years (see R. 182–183). He consistently manifested a strong sense of loyalty and devotion to Germany, and a contempt for the principles of freedom and democracy underlying the Constitution of the United States—feelings which he never renounced and never lost. His enthusiasm for the Hitler movement antedated by several years his naturalization and Hitler's accession to power (R. 40–41). In these

[6] *Schürmann* v. *United States*, 264 Fed. 917, 920 (C. C. A. 9), appeal dismissed, 257 U. S. 621; *United States* v. *Kramer*, 262 Fed. 395, 397 (C. C. A. 5); *United States* v. *Herberger*, 272 Fed. 278, 291 (W. D. Wash.); *United States* v. *Wursterbarth*, 249 Fed. 908, 911 (D. N. J.).

[7] *United States* v. *Schlotfeldt*, 136 F. (2d) 935 (C. C. A. 7); *United States* v. *Haas*, 51 F. Supp. 910, 913 (N. D. N. Y.); *United States* v. *Jogwick*, 51 F. Supp. 2, 6 (N. D. W. Va.); *United States* v. *Kuhn*, 49 F. Supp. 407, 412 (S. D. N. Y.); *United States* v. *Schuchhardt*, 49 F. Supp. 567, 570 (N. D. Ind.); *United States* v. *Wezel*, 49 F. Supp. 16, 18–19 (S. D. Ill.); *United States* v. *Bergmann*, 47 F. Supp. 765, 767 (S. D. Cal.); *United States* v. *Mickley*, 44 F. Supp. 735, 738 (E. D. Mich.).

[8] Cf. *United States* v. *Polzin*, 48 F. Supp. 476 (D. Md.), where the court found that a visit to Germany after naturalization had engendered the subsequent disloyalty.

circumstances, we submit, it was proper for the district court to judge the character of his oath of allegiance by the statements which the petitioner made and the sentiments he recorded in his personal diary subsequent to his naturalization.

The petitioner is an educated and intelligent man. He received a classical high-school education in Germany, was there awarded the equivalent of a master's degree in electrical engineering (R. 146, 150), and spoke or read German, Spanish, Italian, French, and English (R. 154, 297). He liked to read (R. 46, 48–49, 139, 164, 276, 278), and was even familiar with the works of Longfellow, Dickens, and Cooper before he came to this country (R. 152, 154). In the years 1936 to 1938, he was an instructor at the Kansas City School of Engineering (R. 52, 89). He was characterized by one witness as "very brilliant" and "a fine thinker" (R. 139), by another as a man who gave evidence of education and culture (R. 81), and by a third as having the reputation of being very good in his profession (R. 107). He frequently discussed philosophical, political, and religious subjects with the minister of his church (R. 139). He conducted a Sunday School class (R. 46). He occasionally made speeches at public meetings (R. 70–73, 96, 278). His diction on the witness stand, in his diary, and in his letters (particularly the letter to Dr. North—Defendant's Exhibit A, R. 231–232), leaves little doubt of his

ability to express his thoughts clearly. We believe, therefore, that the district court was entitled to accept the statements and writings of the petitioner at their face value. These were the expressions of an educated mature man—made not irresponsibly but deliberately, continuously, and persistently over a period of many years, in every phase of his activities, and without variation in theme.

More than four years before the Hitler government came into power in Germany, the petitioner expressed enthusiasm for the National Socialist movement. Immediately upon beginning work with the Kansas City Power and Light Company in August 1927, about two months after he filed his declaration of intention to become an American citizen and to renounce all allegiance to Germany (R. 243–244), his conversation was devoted largely to praise of the German people and their institutions, but not of the Weimar Republic then in existence (R. 41). His statements were "so strong" that it was necessary to transfer him in order to avoid trouble with his co-workers (*ibid.*). The witness Sherman, with whom the petitioner worked in the company's testing laboratory for over ten years, testified that almost from the time the petitioner entered the laboratory in 1932, he began comparing the United States with the German government (R. 37). Throughout the years that these men worked together, the petitioner consistently praised Hitler

as the leader who had restored the German people to their proper place in the world.

This testimony was corroborated by the witness Heinrich, also an employee of the Kansas City Power and Light Company, who saw the petitioner in the laboratory about twice each week beginning in late 1931 or 1932. In their conversations, the petitioner always asserted the superiority of German methods and the German form of government. Heinrich was a native-born American citizen of German extraction, and when in 1938 he criticized Hitler for his persecutions of minorities and characterized the actions of the Nazis as not being for the good of the German people, he testified that the petitioner called him "a traitor to my country" (R. 39–40).

The witness Hawley, another employee who became acquainted with the petitioner in 1935, testified that the constant subject of the petitioner's conversation was the superiority of Germany to the United States. On one occasion the petitioner stated that he could not see what interest the United States would have in entering the war, his attitude being that if the United States were governed by Germany as a result of the war, it should make no difference since we are now controlled by England (R. 58–59).

The witness Sloan joined the company's testing laboratory in 1938. In that and the following year he conversed frequently with the petitioner. Their conversation almost always re-

volved about Hitler and the German government. He testified that the petitioner said that Hitler would be recorded in history as the greatest man of his time, and that "the democracy of the United States was a practical farce" (R. 83). After the Allied defeat at Dunkirk, the petitioner came to work with a "very jubilant air" about him and told the others "today I am rejoicing" (R. 85).

Two other employees in the company testified regarding their conversations with him. To one he said, after war broke out in Germany, that he was not particularly worried about his family since they were as safe in Germany as they would be here (R. 51). To the other he said that his family had gone to Germany because he wanted his children to be brought up in German schools. The petitioner's speech and behavior were of such a character that on one occasion this latter witness accused him of being a spy (*ibid.*).

The petitioner's conduct and speech outside the laboratory also reflected his basic loyalty to Germany and antipathy to the free democratic principles underlying the form of government of the United States. His conversations with other instructors at the Kansas City School of Engineering in 1937 and 1938 constantly dwelled upon the virtues of Germany; his thesis was that the German race was superior to others; he ridiculed the American government and characterized Germany as "the right form of government"

(R. 52–54). In a speech before a businessmen's association in April 1938, he praised the German form of Government, expressing his approval of government by a dictator (R. 70–71). In November 1938 he made another speech at Overland Park, Kansas, in which he stated that he was a great admirer of Hitler, that he was in sympathy with his policies, and that he would enjoy living in Germany under the Hitler regime (R. 93–94, 96).

The petitioner's devotion to Germany and National Socialism dominated even his religious activities. In the period from September 1937 to June 1938, when he conducted a Sunday School class, he rarely resisted the temptation to present his views on this subject to his pupils. Almost every Sunday he praised and justified the actions of the German army and the German government (R. 91). In his conversations with the school superintendent, the petitioner maintained that the Nazi type of regimentation was superior to democracy (R. 44). He accepted the Nietzschean philosophy that the end justifies the means, and that force is the ultimate, decisive factor in human affairs (R. 49). At a dinner in the church, the petitioner expressed warm admiration and sympathy for the policies of the Hitler government (R. 81–82).

In the fall of 1939 he announced that his daughter had joined the Nazi Youth movement in Germany, and sarcastically described this ac-

tion as "a very un-American thing" (R. 77–78). After the German army had overrun Poland, he stated that we should have a man like Hitler to run the United States, and that there was no doubt that Hitler would rule this country some day and make his home in New York City (R. 32). To a mechanic who repaired his car and who expressed the belief that Hitler should be hanged because of his brutality, the petitioner replied: "If you knew Mr. Hitler like I do, you wouldn't say those things * * * I am for him 100 percent" (R. 57).

The entries made by the petitioner in the personal diary which he kept from December 1, 1938, to June 27, 1941 (R. 251–297), are especially significant as evidence of his state of mind. As he himself testified, the diary laid bare his innermost feelings (R. 216–218). These entries reveal that his devotion to Germany was so deep-seated that it persisted many years after he had taken the oath renouncing absolutely and entirely all allegiance to the Reich:

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The petitioner suggests in his brief here (p. 18), apparently for the first time, that the English translation of the diary entries (Govt. Exhibit 9, R. 251–297) is neither accurate nor fair. The record shows, however, that the translation was made by a thoroughly competent person (R. 108), that the exhibit omitted only such trivia as "[the petitioner] got up in the morning, read the paper and took a walk around the block" (R. 109), and that the translator fairly conveyed the sense of the German words employed by the petitioner (R. 108–113). Counsel for the petitioner explicitly stated at the trial that he had "no objection" to the admission of the translation (Tr. 206).

*December 22, 1938:*

* * * It is an extremely original idea and is another proof of what an abundance of ideas the Germans have as compared to the pedantic, standardization-minded Americans. The only ones who have any ideas here are the Jews and their ideas are vile, mean, and malicious.

The answer of the American Government to the German protest against Ickes' common insults is so arrogant and brazen that it can have only one result, namely, to make the United States more unpopular and despised, not only in Germany but in the entire world, than it already has been without this * * *. (R. 254.)

*January 7, 1939:*

* * * Erich Sachs, of our Steuben Unit, came later to take care of certain preparations regarding solicitation of new members. Then we drank a bottle of Pschorr brew together to the welfare and the future of Germany * * *. (R. 256.)

*February 19, 1939:*

I want to add that the Mottberg clique of the Turnverein wanted to forbid us to display the German flag next to the American at the Winter Aid fair. At a special meeting of the board of directors of the Turnverein, Mottberg was persuaded to give in whereupon Dr. Lyon, an English-American, resigned as director. The entire situation shows the sad condition of Germandom in various circles. (R. 262.)

*February 25, 1939:*

This Mr. Lagna opened the meeting with the German national anthem, whereupon everyone naturally arose and assumed the usual German stance with the arm extended to give the National Socialist greeting. I immediately had the feeling that something seemed to be wrong. This feeling grew stronger when Lagna, in his speech, painted the situation of the German Americans very black and stated that we could really do nothing except to have an occasional congenial get-together such as this one. In other words, we meet behind closed doors and darkened windows, sing the German national anthem courageously, give the National Socialist salute even more bravely, and then decide that we must all be nice and quiet, that we can do nothing, and that things might even get worse.

Later in the course of the evening I said to one of the men, whose name I do not remember and who wore the "D" insignia on his lapel, that in my opinion it was the duty of German American citizens to stand up on their two feet and fend off all attacks on Germany. Thereupon this cautious man replied that we could not do this since we might lose our jobs * * *. (R. 260.)

*March 2, 1939:*

* * * On this occasion I became better acquainted with Attorney Otto Schmid, the democratic politician. * * * Schmid probably had no difficulty vindicating him-

self because I think this fellow is a spy who tells the authorities everything that is going on in German American circles and who has set himself the task of seeing to it that the German herd of people continues to travel in the right direction * * *. (R. 261.)

*March 15, 1939:*

Germany occupies Bohemia and Moravia. End of Czechoslovakia. Hitler goes to Prague. That ends this episode.

The Jewish-American-English fortress in the heart of Central Europe has fallen. A terrible defeat for the above-named powers who will probably have a difficult time recovering from this * * *. (R. 261–262.)

*March 23, 1939:*

Today I heard the radio broadcast of the entrance of Hitler into Memel. Dr. Neumann spoke and then Hitler himself. The church bells could be heard during the entire broadcast. This ends another of the crazy doings of the western democracies * * *. (R. 263.)

*March 29, 1939:*

* * * Sachs is a good fellow and a good German who has not been Americanized, that is, ruined. (R. 264.)

*April 22, 1939:*

In the evening I went with Schwedleis to hear a talk by a German student in the Turner Hall. * * * One cannot blame him for being so enthusiastic about the new Germany and for speaking so disdainfully about America in spite of the fact that he

is probably acting contrary to instructions. (R. 267.)

*April 28, 1939:*

Got up at 4:30 to hear Hitler's speech. There are no words to describe how wonderful it was. (R. 267.)

*February 15, 1940:*

Went to Parkville in the evening and spoke to about 200 students and teachers on National Socialism. The talk was arranged by the YMCA, the German Club, and the International Relations Club. Took Juanita and Davis home to Furrs. (R. 278.)

*February 22, 1940:*

Otto Schmidt, lawyer and "Assistant Federal District Attorney," is the chairman of the Association. I have always suspected Schmidt in his capacity as leader of the German organizations of being more or less of a spy whose job it is to see what goes on in German circles. We Steubens agreed to join the Round Table permanently and in this way it will be possible to watch Schmidt more closely. Perhaps I am allowing my distrust to go a little too far, but at any rate it is better to be careful. (R. 279.)

*June 25, 1940:*

Stayed home in the evening. Mrs. Eyssell showed me her Red Cross button which she received for her donation to the Red Cross. This is a fund which is intended ex-

clusively for England and the Jews and, therefore, against Germany. Comment superfluous. (R. 287.)

*July 27, 1940:*

* * * It is strange how Mrs. August Eyssell talks about Hitler and Germany—the way most people talk about them here. Even Helen Eyssell, to whom I always thought Germany meant more than just an entertaining place to stay, today made it very evident that she was an "American" girl. (R. 288.)

*August 28, 1940:*

Meeting of the Round Table in the evening concerning the holding of German Day. Lukewarm sentiment. Otto Schmid comes out openly as an enemy of Germany * * *. (R. 288.)

*November 18, 1940:*

Went to Befferts in the evening. Both are ridiculously primitive and uneducated. They really feel at home in this country just like all other people of their type. (R. 292.)

*March 25, 1941:*

This morning I heard the broadcast of the ceremony in connection with Yugoslavia's entrance into the three-power pact in Vienna. The rage of the English and the "Americans" knows no bounds. * * * In the meantime, the English and the "Americans" are gnashing their teeth. * * * Well, these gentlemen

> will probably have to suffer more attacks of rage before they finally realize that the world has already passed them by. (R. 295.)
>
> *June 17, 1941:*
>
> The whole country is under the influence of the insane actions of the Government in Washington which have the character of wild, unbridled despotism. Practically no German citizen can leave the country. They are held as hostages, say the radio announcers. In contrast to this, Germany has always treated Americans with the greatest respect. Went to the movies in the evening. (R. 297.)

Other pertinent entries are set forth in the opinion of the Circuit Court of Appeals, and for that reason are not here repeated. In general, they show great admiration for Hitler (R. 258, 267, 296); desire that Hitler should rule the United States (R. 32, 58, 66); happiness over German military successes (R. 261, 262, 263, 285); resentment of any criticism of the Nazi regime (R. 257, 258, 296); impatience at the failure of certain German-American organizations to be more aggressive in their display of German sympathies (R. 260, 261, 262, 273, 278, 288, 294); suspicion and disapproval of pro-American persons of German extraction (R. 253, 259, 261, 264, 268, 269–270, 274, 278, 279, 281, 282, 288, 292); and contempt for the western democracies, including the United States (R. 254–255, 262–263, 265, 266, 267, 271, 293, 295, 297).

While no single remark or diary entry was in itself sufficient proof of the petitioner's lack of allegiance to the United States, their cumulative significance is inescapable. Considered as a whole, the evidence clearly showed that the petitioner's entire mode of thought, his interests and his judgments, and his emotional attachments, were colored by a strong devotion and fidelity to Germany; that at heart he had not fully renounced all loyalty and allegiance to the German Reich. Long after he had taken the oath to bear true faith and allegiance to the United States, the persistent emphasis of his thoughts and his words was upon the superiority of the German people, their form of government, and their institutions. It was the constant subject of his conversations with others, and apparently was foremost in his mind. He never evinced any concern, any praise, any respect, any love for the United States. He was contemptuous of the democratic and American system of government (R. 53–54, 58, 64, 69, 83, 84, 265, 291), and predicted that the democracies were "on the way out" (R. 66, 295). He preferred the totalitarian rule of a dictator (R. 78, 84). The President's speech concerning protection of freedom of thought was to him "laughable" (R. 255, 69). To be Americanized was to be "ruined" (R. 264). He could not understand Germans who felt at home in this country or who criticized Germany (R. 268, 288).

292). It seemed to him natural, and apparently desirable, that the United States should one day be ruled by Germany (R. 32, 58, 66).

In striking contrast to his antagonistic attitude toward the United States was the petitioner's fidelity and allegiance to the German Reich. He was never critical of Germany, the German people, or Hitlerism. He defended and justified every action taken by the Nazis (R. 40, 47–48, 61, 70, 72, 73, 74, 82, 83, 89, 91, 92, 95, 96, 259, 264, 267, 275, 295). The national anthem which he recognized was the German one (R. 260–261); the country to whose future and welfare he drank was Germany, not the United States (R. 256); an American citizen of German extraction who criticized Hitler was regarded by him as a "traitor" to his country (R. 40).

In his own defense, the petitioner failed to produce a witness who could testify to a single affirmative act or expression evidencing any fidelity or devotion to the United States. His witnesses could testify to no more than that they had heard nothing of a disloyal nature concerning the petitioner, and that they believed him to be a good citizen. As the Circuit Court of Appeals observed, such testimony was "of little or no probative value on the question of fraud in his oath of allegiance at the time of his naturalization. Good moral character is not inconsistent with loyalty to the German Reich * * *" (R. 347). See

*United States* v. *Haas,* 51 F. Supp. 910, 913 (N. D. N. Y.); *United States* v. *Herberger,* 272 Fed. 278, 289 (W. D. Wash.); *United States* v. *Jogwick,* 51 F. Supp. 2, 7 (N. D. W. Va.); *United States* v. *Reinsch,* 50 F. Supp. 971, 972 (W. D. Wash.); *United States* v. *Wezel,* 49 F. Supp. 16, 17 (S. D. Ill.); *United States* v. *Bergmann,* 47 F. Supp. 765, 769 (S. D. Cal.); *United States* v. *Wursterbarth,* 249 Fed. 908, 910 (D. N. J.).

We submit that the evidence before the trial court clearly and convincingly supports his finding that the petitioner never in fact renounced all allegiance to the German Reich; that he believed in principles of National Socialism which were antagonistic to and irreconcilable with devotion and loyalty to the principles of democracy and individual liberty underlying the Constitution and laws of the United States; and that he never bore and never intended to bear true faith and allegiance to the United States. This Court may take notice that the doctrines of National Socialism are wholly repugnant to the American conception of democratic government and personal liberty. See *National Socialism, Basic Principles, Their Application by the Nazi Party's Foreign Organization, and the Use of Germans Abroad for Nazi Aims,* Department of State, Publication No. 1864, December 1, 1942. Expert testimony on this subject was heard by the trial court (R. 114–138). The decisions of the lower

courts are unanimous in holding that a person cannot approve and extol the principles of National Socialism and at the same time bear true faith and allegiance to the Constitution and the laws of the United States. *United States* v. *Schlotfeldt*, 136 F. (2d) 935 (C. C. A. 7); *United States* v. *Bergmann*, 47 F. Supp. 765 (S. D. Cal.); *United States* v. *Kuhn*, 47 F. Supp. 407, 413, 414 (S. D. N. Y.); *United States* v. *Schuchhardt*, 49 F. Supp. 567, 569–570 (N. D. Ind.); *United States* v. *Wezel*, 49 F. Supp. 16, 19 (S. D. Ill.); *United States* v. *Ritzen*, 50 F. Supp. 301, 302 (S. D. Tex.); *United States* v. *Ebell*, 44 F. Supp. 43, 46 (W. D. Tex.); *United States* v. *Haas*, 51 F. Supp. 910, 911 (N. D. N. Y.). "One cannot profess or serve both, without disloyalty to one." *United States* v. *Bergmann*, *supra*, at 767.

## II

### CANCELLATION OF THE PETITIONER'S CITIZENSHIP WAS PROPER UNDER THE STATUTE AND THE CONSTITUTION

Since the petitioner's oath of allegiance was found to have been false and fraudulent, the district court properly directed that the order admitting him to citizenship, together with his certificate of naturalization, be cancelled (R. 27). The validity of this decree was upheld by the Circuit Court of Appeals (R. 338–352). We submit that the taking of a false oath of allegiance when

the applicant for citizenship does not renounce all allegiance to the country of his origin, and believes in principles of government which are incompatible with devotion and fidelity to the United States, constitutes fraud and illegality within Section 338 of the Nationality Act of 1940; and that the Act as thus applied is not unconstitutional.

A. CANCELLATION OF THE PETITIONER'S CITIZENSHIP ON EITHER THE GROUND OF FRAUD OR ILLEGALITY WAS AUTHORIZED BY THE STATUTE

The first statute to provide for the cancellation or revocation of naturalization was the Act of June 29, 1906, c. 3592, 34 Stat. 596. Section 338 of the Nationality Act of October 14, 1940, c. 876, 54 Stat. 1137, 1158, 8 U. S. C. 738, substantially incorporates Section 15 of the 1906 Act (see Appendix, *infra*, pp. 60–61). It provides, in pertinent part, as follows:

> It shall be the duty of the United States district attorneys for the respective districts, upon affidavit showing good cause therefor, to institute proceedings in any court specified in subsection (a) of section 301 [§ 701 of this title] in the judicial district in which the naturalized citizen may reside at the time of bringing suit, for the purpose of revoking and setting aside the order admitting such person to citizenship and cancelling the certificate of naturalization on the ground of fraud or on the

ground that such order and certificate of naturalization were illegally procured.

Section 4 of the Act at the time of the petitioner's naturalization (see Appendix, *infra*, p. 61),[10] provided as follows:

> He [any alien] shall, before he is admitted to citizenship, declare on oath in open court that he will support the Constitution of the United States, and that he absolutely and entirely renounces and abjures all allegiance and fidelity to any foreign prince, potentate, state, or sovereignty, and particularly by name to the prince, potentate, state, or sovereignty of which he was before a citizen or subject; that he will support and defend the Constitution and laws of the United States against all enemies, foreign and domestic, and bear true faith and allegiance to the same.

The language of the statute authorizing cancellation of citizenship on the grounds of fraud and illegality is absolute and unqualified. It does not except fraud or illegality which consists of a false representation to the court as to the applicant's intention to renounce all allegiance to the country of his origin and to bear true faith and allegiance to the United States. And there is no

[10] As has already been shown (*supra*, pp. 14–15), the statutory requirement that an oath of allegiance to the United States be taken by an alien is almost one hundred and fifty years old.

basis upon which such an exception can be read into the unequivocal terms of the statute.

The legislative history of the 1906 Act discloses that Congress was principally concerned with cases in which naturalization was fraudulently procured. The report of the House Committee on Immigration and Naturalization, to which was referred the bill which eventually became the 1906 Act, stated as follows (H. Rep. No. 1789, 59th Cong., 1st sess., p. 2):

> With the great influx of foreigners who have in recent years come to our shores and who are yearly coming in increasing numbers, and who seek naturalization under our laws, a very loose, unsatisfactory, and careless method of naturalization has grown up, leading to the grossest character of frauds against American citizenship: The conditions that have been revealed by special investigations of the frauds committed against the naturalization laws render wholly unnecessary any argument upon the necessity at this time of fully exercising all the authority in naturalization matters conferred by the Constitution upon Congress.
>
> * * * * *
>
> The worst and most glaring frauds have consisted in perjury, false impersonation, and the sale and use of false and counterfeit certificates of naturalization. * * * In order to correct the abuses that have been disclosed it is imperative, in the judgment of your committee, that a law should be

> enacted prescribing a fixed and uniform system and a code of procedure in naturalization matters.

The report of the Senate Committee on Immigration repeated this statement in *haec verba*. See S. Rep. No. 4373, 59th Cong., 1st sess., pp. 1–2. Representative Crumpacker, one of the sponsors of the legislation, emphasized during the debates that the legislation authorized cancellation where the certificate of citizenship was procured by practicing a fraud on the court (40 Cong. Rec. 7040):

> If any alien shall impose upon the court by perjured testimony, or if a certificate has been issued in violation of law, the bill makes the certificate invalid and authorizes proceedings in any court of competent jurisdiction to cancel the certificate of citizenship * * * A certificate tainted with fraud is in the sense of the law no certificate at all.

While this is the first case in this Court presenting the question whether a false oath of allegiance may be made the basis upon which a certificate can be cancelled under the statute as having been fraudulently or illegally procured, the question has frequently arisen before the lower courts. The decisions are substantially uniform in holding that a false oath of allegiance vitiates naturalization. See *Schurmann* v. *United States*, 264 Fed. 917 (C. C. A. 9), appeal dismissed, 257 U. S. 621; *United States* v. *Kramer*, 262 Fed. 395 (C. C. A. 5); *United States* v. *Schlotfeldt*, 136 F.

(2d) 935 (C. C. A. 7); *United States* v. *Herberger*, 272 Fed. 278 (W. D. Wash.); *United States* v. *De Tolna*, 27 F. (2d) 984 (E. D. N. Y.); *United States* v. *Wursterbarth*, 249 Fed. 908 (D. N. J.); *United States* v. *Ebell*, 44 F. Supp. 43 (W. D. Tex.); *United States* v. *Mickley*, 44 F. Supp. 735 (E. D. Mich.); *United States* v. *Bergmann*, 47 F. Supp. 765 (S. D. Cal.); *United States* v. *Kuhn*, 49 F. Supp. 407 (S. D. N. Y.); *United States* v. *Schuchhardt*, 49 Supp. 567 (N. D. Ind.); *United States* v. *Dietz*, 52 F. Supp. 201 (N. D. Cal.); *United States* v. *Wezel*, 49 F. Supp. 16 (S. D. Ill.); *United States* v. *Jogwick*, 51 F. Supp. 2 (N. D. W. Va.); *United States* v. *Haas*, 51 F. Supp. 910 (N. D. N. Y.); *United States* v. *Wolter*, 53 F. Supp. 417 (W. D. Pa.).

We submit that these decisions reflect a proper appreciation by the lower courts of the great importance of the oath of allegiance in naturalization proceedings. The oath of allegiance has become particularly significant as a consequence of the Act of June 8, 1926, c. 502, 44 Stat. 709. Prior to the 1926 amendment, the Act of 1906 provided for a full judicial hearing upon the merits of a petition for naturalization. As was observed in *Schneiderman* v. *United States*, 320 U. S. 118, 123, the 1906 Act required that notice of the filing of the naturalization petition be given 90 days before the petition was acted on (Section 6); the hearing on the petition took place in open court (Section 9); and the Government had a right to

appear, to cross-examine the applicant and his witnesses, to introduce evidence, and to oppose the petition (Section 11).

This duty became so burdensome upon the federal courts, however, that Congress in 1926 introduced an entirely new procedure in naturalization proceedings. The background of the 1926 amendment is illumined by a letter written by Chief Justice Taft on May 25, 1926, to the chairman of the House Committee on Immigration and Naturalization (see H. Rep. No. 1328, 69th Cong., 1st sess., p. 2):

> I have examined Senate bill 4251 as it has been submitted to the House, and I sincerely hope that it will pass, because I think it will very much shorten the time which the Federal district judges have had to take in the matter of naturalization. I could have wished that the necessity for administering the oath by a Federal judge might also have been dispensed with, because in great centers where there are many applicants for naturalization there is much interference with the regular business of the court in criminal and civil matters by the presence in the corridors and in the court rooms of the applicants for naturalization, their witnesses, and their families. The time of one district judge in some districts for 2 or 3 days in the week is consumed with the hearings of naturalization cases. It can be just as well done by the examiners selected by the

> senior district judge, as provided in this bill, and the hanging about the court rooms and the court corridors of the applicants and the witnesses can be very largely avoided by requiring them to attend upon the examiners at a different place. If there are to be but few personal examinations by the judges, as this act indicates, the matter of the administering of the oaths of allegiance to those who are admitted can be disposed of in very much less time than under the present system. I earnestly hope that the bill will pass.

Judges Learned Hand, Augustus N. Hand, George W. Anderson and Edward J. Henning also appeared before the Committee and testified that the district courts did not have the necessary facilities for determination of the facts as to each of the many applicants for citizenship (H. Rep. No. 1328, 69th Cong., 1st sess., p. 1). And the Secretary of Labor and the Commissioner of Naturalization had for many years recommended legislation "to relieve the courts in the large cities from the disorderly congestion of the unnecessary number of witnesses with the applicants at naturalization hearings." (*Ibid.*)

As a result of these weighty recommendations, Congress amended Section 4 of the Act of 1906. The procedural changes effected by the 1926 amendment (Act of June 8, 1926, c. 502, 44 Stat. 709) are summarized in the *Report Proposing a Revision and Codification of the Nationality Laws*

*of the United States*, prepared at the request of the President of the United States, by the Secretary of State, the Attorney General, and the Secretary of Labor (June 13, 1938), pp. 45–46:

> The judges of the United States district courts are authorized to designate naturalization examiners or officers to conduct preliminary hearings upon petitions for naturalization in such courts and to present to the courts findings and recommendations thereon. Such examiners or officers are empowered to take testimony concerning any matter touching or in any way affecting admissibility to naturalization, to subpena witnesses, and to administer oaths, including the oath of the petitioner to his petition and the oaths of his witnesses. The findings of such examiners or officers are required to be submitted to the court at the final hearing upon the petition with recommendations for granting, denial, or continuance, with the reasons therefor.
>
> If the facts are favorable, the witnesses are excused from appearing in open court, the petitioner alone presenting himself in order to take the oath of allegiance. The judge to whom such findings and recommendations are submitted is required to approve, by written order, the recommendations, with such exceptions as he may deem proper. Lists of the petitioners for naturalization whose cases are heard and recommended are required to be filed perma-

> nently of record in the court and with the Commissioner of Immigration and Naturalization.
>
> While hearing under the 1926 Act does not require the examination of the petitioner and witnesses under oath before the court and in the presence of the court, the court may upon its own initiative at its discretion, and if required upon the demand of the petitioner, have an examination of the petitioner and his witnesses made under oath before the court and in the presence of the court.

Congress in 1929 further amended the statute by omitting from Section 4 the words "It shall be made to appear to the satisfaction of the court admitting any alien to citizenship" that the alien possesses the requisite qualifications. The statute since 1929 has provided that "No alien shall be admitted to citizenship unless" he possesses these qualifications. Act of March 2, 1929, c. 536, § 6 (b), 45 Stat. 1513 (see Appendix, *infra,* pp. 63–64).

A very recent opinion, as yet unreported, of Judge Fee in *United States* v. *Scheurer,* decided by the District Court of the United States for the District of Oregon on March 20, 1944, contains an authoritative description of the manner in which the naturalization process actually functions in the district courts: The judges no longer designate the naturalization examiners, who are now completely under administrative control (Sec. 333, Act of October 14, 1940, c. 876, 54 Stat.

1156). The district court exercises no supervision over the administrative proceedings conducted by the examiners. Only in exceptional cases are judicial hearings held in court. Normally the judge does not see any witnesses; he does not hear any evidence; nor does he even have the petition for naturalization before him. No actual findings or conclusions or reasons for the recommendations are ever stated to the court by the examiners. The final hearing before the court consists merely of the presentation of the examiner's recommendation for the admission of a class of applicants—sometimes including as many as several hunderd persons—and the administration of the oath of allegiance, usually accompanied by an address of the court welcoming the applicants into the ranks of citizenship. No actual hearing, involving the testimony of witnesses and the like, is held by the court unless demanded by an applicant after an adverse finding by the naturalization examiner.

The records of the Immigration and Naturalization Service show that during the fiscal years 1927 to 1934, inclusive, of 791,724 cases in which naturalization examiners conducted preliminary hearings for the courts, heard the testimony, and made recommendations, 782,955, or 98.89% of the recommendations were approved. See *Report Proposing a Revision and Codification of the Nationality Laws of the United States, supra,* at p. 47.

It is obvious, therefore, that the oath of allegiance taken by an applicant in his petition for naturalization and in open court constitutes the principal "testimony" which is normally heard by the district court in determining whether a certificate of citizenship should be granted. The oath constitutes a representation by the applicant that he is fitted for citizenship, that he will support and defend the Constitution and laws of the United States, that he renounces all allegiance to the country of his origin, and will bear true faith and allegiance to the United States, without mental reservation or purpose inconsistent therewith—"matters which are of the essence of the statutory requirements" (*United States* v. *Macintosh*, 283 U. S. 605, 616).

In *United States* v. *Ginsberg*, 243 U. S. 472, 475, the Court held: "No alien has the slightest right to naturalization unless all statutory requirements are complied with; and every certificate of citizenship must be treated as granted upon condition that the Government may challenge it as provided in § 15 and demand its cancellation unless issued in accordance with such requirements." Renunciation of all allegiance to the German Reich was an express statutory condition precedent to the petitioner's valid acquisition of citizenship. Since this condition was not fulfilled, his citizenship was illegally procured. As has been shown (*supra*, pp. 43–44), the decisions of the lower courts have consistently

[redacted] held that the taking of a false oath of allegiance invalidates a certificate of citizenship thus procured. Congress has often revised the naturalization laws, but it has never undertaken to modify the construction made in these decisions. Indeed, in Section 338 of the Nationality Act of 1940 (8 U. S. C. 738), Congress reenacted Section 15 of the 1906 Act in substantially identical terms. See Appendix, *infra*, pp. 60–61.

The record in the present case shows that the evidence upon which the district court in 1932 admitted him to citizenship consisted only of (a) his petition for naturalization; (b) the affidavits of two witnesses; (c) the recommendation of the examiner that the petitioner, along with 64 others, be granted naturalization; and (d) his oath of allegiance (R. 244–251). We submit that, in these circumstances, his taking a false oath of allegiance constituted a fraud upon the court; and that, in any event, his citizenship was illegally procured in that he did not in fact completely renounce all allegiance to the German Reich. Quite apart from fraud, naturalization is illegally obtained if a condition essential to citizenship, namely, renunciation of all allegiance to the country of the petitioner's origin and the bearing of true faith and allegiance to the United States, is not satisfied. Cf. *Schwinn* v. *United States*, 112 F. (2d) 74 (C. C. A. 9), affirmed 311 U. S. 616; *United States* v. *Herberger*, 272 Fed. 278, 291 (W. D. Wash.); *United States* v. *Fischer*,

48 F. Supp. 7, 8 (S. D. Fla.); *United States* v. *Jogwick*, 51 F. Supp. 2, 5 (N. D. W. Va.); *United States* v. *Mickley*, 44 F. Supp. 735, 738 (E. D. Mich.). The certificate of naturalization procured by the petitioner was a nullity, and its cancellation was plainly authorized by the statute.

B. THE DOCTRINE OF RES JUDICATA DOES NOT PRECLUDE CANCELLATION OF A FRAUDULENTLY AND ILLEGALLY PROCURED CERTIFICATE OF NATURALIZATION

The petitioner in his brief (pp. 32–39) makes an argument, apparently suggested by the doubts expressed in the concurring opinions of Mr. Justice Douglas and Mr. Justice Rutledge in the *Schneiderman* case (320 U. S. at 161–170), that the doctrine of *res judicata* precludes cancellation of the petitioner's citizenship on the ground of fraud or illegality, and that legislative authorization of such a remedy is an unconstitutional interference with the judicial power. We submit, however, that the doctrine of *res judicata* is inapplicable to the facts of this case; that no principle is more firmly established in the law than that one who fraudulently induces a court to enter judgment in his favor cannot invoke the doctrine of *res judicata* for the purpose of preventing the court from setting aside the judgment as having been fraudulently obtained; and that, in any event, the statute as applied here does not unconstitutionally interfere with the judicial function reserved to the federal courts by Article III of the Constitution.

It is well settled that a judgment obtained through practice of fraud on a court may subsequently be set aside on that ground. *Marshall* v. *Holmes*, 141 U. S. 589; *Simon* v. *Southern Railway*, 236 U. S. 115; *Trenies* v. *Sunshine Min. Co.*, 308 U. S. 66, 78. *United States* v. *Throckmorton*, 98 U. S. 61, and *Moffat* v. *United States*, 112 U. S. 24, relied upon by the petitioner in his brief (p. 32), are relevant here only insofar as they hold that the issue of fraud can itself become *res judicata* when it has been litigated and adjudicated in the judgment sought to be set aside. But where, as in the present case, the issues of fraud and illegality were not litigated in the prior proceeding, the judgment is *res judicata* "only as to those matters in issue or points controverted, upon the determination of which the finding or verdict was rendered", *Cromwell* v. *County of Sac*, 94 U. S. 351, 353; *Mercoid Corp.* v. *Mid-Continent Investment Co.*, 320 U. S. 661, 671, and cases there cited. As the record here shows, the petitioner was one of sixty-five persons naturalized simultaneously in a single order of the court, all having been recommended for naturalization by an examiner of the Bureau of Naturalization (R. 248–251). The issues of fraud and illegality were neither tendered by the Government nor determined by the Court. Manifestly, this case does not fall within the scope of the doctrine of *res judicata*.

Even prior to the enactment of the Act of June 29, 1906, which explicitly conferred jurisdiction in the district courts to cancel judgments of naturalization on the ground of fraud, both federal and state courts had exercised a similar jurisdiction. As Judge Hough stated in *United States* v. *Mansour,* 170 Fed. 671, 675–676 (S. D. N. Y., 1908), "courts granting naturalization have for generations revoked or canceled their own grants or judgments, when convinced that they have been imposed upon, or deceived * * *."

In his annual message to Congress on December 1, 1890, President Harrison stated as follows: "The vacation by judicial decrees of fraudulent certificates of naturalization, upon bills in equity filed by the Attorney-General in the circuit court of the United States, is a new application of a familiar equity jurisdiction. Nearly one hundred such decrees have been taken during the year, the evidence disclosing that a very large number of fraudulent certificates of naturalization have been issued." And on May 29, 1905, a Special Assistant United States Attorney reported to the Attorney General that during the preceding two years 1,916 fraudulently obtained certificates of citizenship had been cancelled through the efforts of the United States Attorney for the Southern District of New York. See *Report to the President of the Commission on Naturalization,* H. Doc. No. 46, 59th Cong., 1st

Sess., Appendix D, p. 76. The cases in which, prior to the Act of June 29, 1906, naturalization was cancelled on account of fraud are collected in a report submitted to Congress by Secretary of State Elihu Root on December 18, 1906 (H. Doc. No. 326, 59th Cong., 2d sess., p. 131 *et seq.*) See, *e. g.*, *In re McCoppin*, 15 Fed. Cas. 1300 (Case No. 8713, C. C., D. Cal., 1869); *United States* v. *Norsch*, 42 Fed. 417 (E. D. Mo., 1890); *United States* v. *Kornmehl*, 89 Fed. 10 (D. N. J., 1898).[11]

The question of the constitutionality of Section 15 of the 1906 Act first came before this Court in *Johannessen* v. *United States*, 225 U. S. 227. The Court there specifically rejected the contention that the doctrine of *res judicata* entitled the petitioner to retain his citizenship: "An alien has no moral or constitutional right to retain the privileges of citizenship if, by false evidence or the like, an imposition has been practiced upon the court, without which the certificate of citizenship could not and would not have been issued." (225 U. S. at 241). This ruling was reaffirmed in *Luria* v. *United States*, 231 U. S. 9, and *United States* v. *Ginsberg*, 243 U. S. 472, 475. In the

[11] For instances in which state courts, both before and after the 1906 Act, have recognized the inherent power of a court of equity to set aside a judgment of naturalization procured by fraud, see *Ting* v. *U. S. District Attorney*, 148 Cal. 773 (1906); *In re O'Sullivan*, 137 Mo. App. 214 (1909); *Commonwealth* v. *Paper*, 1 Brews. (Pa.) 263 (1868); *Marchus's Naturalization*, 237 Pa. St. 132 (1912).

next case which arose under the Act, *United States* v. *Ness*, 245 U. S. 319, the United States sought to set aside the petitioner's citizenship as having been illegally procured because of his failure to file the required certificate of arrival. The petitioner pleaded *res judicata* since the Government concededly had appeared in opposition to the granting of naturalization and had unsuccessfully urged that the petition be denied on the same ground. It was held, nevertheless, that the doctrine of *res judicata* was inapplicable to cancellation proceedings brought under the statute. Speaking for a unanimous Court, Mr. Justice Brandeis said that the provisions of the Act of 1906 "were designed to afford cumulative protection against fraudulent or illegal naturalization" (245 U. S. at 327). In *Maney* v. *United States*, 278 U. S. 17, the Court again reaffirmed the doctrine that *res judicata* is inapplicable to these proceedings. In the latter case, Mr. Justice Holmes emphasized the special character of cancellation proceedings as being "enough to warrant a special treatment" (278 U. S. at 23).

In the *Schneiderman* case the opinion of the Court stressed the basic similarity of denaturalization proceedings to suits to annul fraudulent land grants and letters of patent. 320 U. S. at 125; and see *Johannessen* v. *United States*, 225 U. S. 227, 238; *Tutun* v. *United States*, 270 U. S. 568. Accordingly, the special rule as to burden of proof applicable in the latter cases was ex-

tended to denaturalization proceedings. We believe that, by parity of reasoning, the well-settled principle that *res judicata* does not preclude cancellation of fraudulently and illegally procured public land grants and letters of patent (see *United States* v. *Minor*, 114 U. S. 233; *Colorado Coal & Iron Co.* v. *United States*, 123 U. S. 307; *United States* v. *Bell Telephone Company*, 128 U. S. 315; *Moffat* v. *United States*, 112 U. S. 24; *United States* v. *San Jacinto Tin Co.*, 125 U. S. 273; *Maxwell Land-Grant Case*, 121 U. S. 325), should also be applicable in denaturalization proceedings.[12]

As has been shown, Congress in 1926 rejected as impractical and undesirable a system under which the district judges were called upon to investigate the facts relating to each application for naturalization. It chose instead to adopt a procedure which was predominantly administrative in character, at least in its first stage, thus facilitating the expeditious disposition of a great volume of naturalzation cases without imposing a needless burden upon the district courts. Congress plainly regarded the remedy of the Government to obtain cancellation of fraudulently and illegally procured certificates of naturalization as

[12] That the doctrine of *res judicata* does not inhere in the judicial function is evidenced by the line of decisions establishing that the principle does not apply to a decision on *habeas corpus* refusing to discharge a prisoner. See *Waley* v. *Johnston*, 316 U. S. 101, 105; *Salinger* v. *Loisel*, 265 U. S. 224, 230.

an essential part of the scheme of naturalization which it adopted. If the doctrine of *res judicata* should be held applicable here, such a remedy would for practical purposes be wholly ineffective. Congress would thus be compelled to abandon a system of naturalization which has been found to be most practicable and desirable, in the interests of the applicants as well as the courts, and to reestablish a procedure which was tried for many years and was found unsatisfactory.

C. CANCELLATION OF THE PETITIONER'S CITIZENSHIP DOES NOT INVOLVE ABRIDGEMENT OF HIS CONSTITUTIONAL RIGHT OF FREE SPEECH

To cancel the petitioner's citizenship on the ground that it was fraudulently and illegally procured is not to penalize him for the expression of unpopular political beliefs. He is not in any sense being punished for his lack of allegiance to the United States; he is merely being deprived of that to which he was never lawfully entitled. The proceeding is equitable in nature, not penal. *Luria* v. *United States*, 231 U. S. 9, 27. It cannot be doubted that Congress can constitutionally insist upon allegiance to the United States as a condition to citizenship. See *United States* v. *Macintosh*, 283 U. S. 605, 616; *Turner* v. *Williams*, 194 U. S. 279, 293. Congress could have dispensed with such a requirement, but it was under no constitutional compulsion to do so. The standard of allegiance necessarily involves inquiry into

convictions which might be characterized as political in nature. While Congress could not, consistently with the prohibitions of the First Amendment, proscribe expressions of convictions, it could certainly make such expressions relevant in determining whether the test of allegiance has been satisfied. This is the limited extent to which the petitioner's utterances have legal significance in the case at bar. We submit that, obviously, no infringement of his undoubted constitutional right of free speech is involved.

## CONCLUSION

The judgment below should be affirmed.

Respectfully submitted.

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APRIL 1944.

## APPENDIX

### Statutory Provisions

Sec. 15 of the Act of June 29, 1906, in its amended form, upon the date of the petitioner's naturalization, provided:

> It shall be the duty of the United States district attorneys for the respective districts, or the Commissioner or Deputy Commissioner of Naturalization, upon affidavit showing good cause therefor, to institute proceedings in any court having jurisdiction to naturalize aliens in the judicial district in which the naturalized citizen may reside at the time of bringing the suit, for the purpose of setting aside and canceling the certificate of citizenship on the ground of fraud or on the ground that such certificate of citizenship was illegally procured. * * * (Act of June 29, 1906, c. 3592, sec. 15, 34 Stat. 601, as amended, 8 U. S. C. 405 (1934 ed).

Sec. 338 of the Nationality Act of 1940, c. 876, 54 Stat. 1140, 1158 (8 S. C. 738) provides:

> (a) It shall be the duty of the United States district attorneys for the respective districts, upon affidavit showing good cause therefor, to institute proceedings in any court specified in subsection (a) of section 301 in the judicial district in which the naturalized citizen may reside at the time of bringing suit, for the purpose of revoking and setting aside the order admitting

such person to citizenship and canceling the certificate of naturalization on the ground of fraud or on the ground that such order and certificate of naturalization were illegally procured.

Sec. 4 of the Act of June 29, 1906, upon the date of the petitioner's naturalization, provided in part:

> He [any alien] shall, before he is admitted to citizenship, declare on oath in open court that he will support the Constitution of the United States, and that he absolutely and entirely renounces and abjures all allegiance and fidelity to any foreign prince, potentate, state, or sovereignty, and particularly by name to the prince, potentate, state, or sovereignty of which he was before a citizen or subject; that he will support and defend the Constitution and laws of the United States against all enemies, foreign and domestic, and bear true faith and allegiance to the same. (Act of June 29, 1906, c. 3592, sec. 4, 34 Stat. 597, formerly 8 U. S. C. 381 (1926 ed.).)

The Act of June 8, 1926, c. 502, 44 Stat. 709, amended Section 4 of the 1906 Act by adding thereto the following provisions:

> Fourteenth. (a) The judge of any United States district court, or the senior judge of such court if there are more judges than one, is hereby authorized, in his discretion, to designate one or more examiners or officers of the Bureau of Naturalization (including the Naturalization Servive) serving as such examiner or officer within the territorial jurisdiction of such court, to conduct preliminary hearings upon petitions for naturalization to such

court, and to make findings and recommendations thereon. For such purposes any such designated examiner or officer is hereby authorized to take testimony concerning any matter touching or in any way affecting the admissibility of any petitioner for naturalization, to subpoena witnesses, and to administer oaths, including the oath of the petitioner to his petition and the oath of his witnesses.

(b) The findings of any such designated examiner or officer upon any such preliminary hearing shall be submitted to the court at the final hearing upon the petition required by section 9, with a recommendation that the petition be granted or denied or continued, with the reasons therefor. Such findings and recommendations shall be accompanied by duplicate lists containing the names of the petitioners, classified according to the character of the recommendations, and signed by the designated examiner or officer. The judge to whom such findings and recommendations are submitted shall by written order approve such recommendations with such exceptions as he may deem proper, by subscribing his name to each such list when corrected to conform to his conclusions upon such recommendations. One of such lists shall thereafter be filed permanently of record in such court and the duplicate list shall be sent by the clerk of such court to the Commissioner of Naturalization.

(c) The provisions of section 9 requiring the examination of the petitioner and witnesses under oath before the court and in the presence of the court shall not apply in any case where a designated examiner or officer has conducted the preliminary

> hearing authorized by this subdivision; except that the court may, in its discretion, and shall, upon demand of the petitioner, require the examination of the petitioner and the witnesses under oath before the court and in the presence of the court.

Prior to the Act of March 2, 1929, c. 536, § 6 (b), 45 Stat. 1513, sec. 4 of the 1906 Act provided in part:

> It shall be made to appear to the satisfaction of the court admitting any alien to citizenship that immediately preceding the date of his application he has resided continuously within the United States five years at least, and within the State or Territory where such court is at the time held one year at least, and that during that time he has behaved as a man of good moral character, attached to the principles of the Constitution of the United States, and well disposed to the good order and happiness of the same. In addition to the oath of the applicant, the testimony of at least two witnesses, citizens of the United States, as to the facts of residence, moral character, and attachment to the principles of the Constitution shall be required, and the name, place of residence, and occupation of each witness shall be set forth in the record. (Act of June 29, 1906, c. 3592, sec. 4, 34 Stat. 598, formerly 8 U. S. C. 382 (1926 ed.).)

The Act of March 2, 1929, c. 536, § 6 (b), 45 Stat. 1513 (8 U. S. C. 382 (1934.)), amended the above provision to read as follows:

> No alien shall be admitted to citizenship unless (1) immediately preceding the

date of his petition the alien has resided continuously within the United States for at least five years and within the county where the petitioner resided at the time of filing his petition for at least six months, (2) he has resided continuously within the United States from the date of his petition up to the time of his admission to citizenship, and (3) during all the periods referred to in this subdivision he has behaved as a person of good moral character, attached to the principles of the Constitution of the United States, and well disposed to the good order and happiness of the United States.

U. S. GOVERNMENT PRINTING OFFICE: 1944

# SUPREME COURT OF THE UNITED STATES.

No. 493.—October Term, 1943.

| | |
|---|---|
| Carl Wilhelm Baumgartner, Petitioner, *vs.* The United States of America. | On Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit. |

[June 12, 1944.]

Mr. Justice Frankfurter delivered the opinion of the Court.

On September 26, 1932, the United States District Court for the Western District of Missouri entered its order admitting Baumgartner to citizenship and issued a certificate of naturalization to him. Almost ten years later, on August 21, 1942, the United States brought this suit under § 338 of the Nationality Act of 1940 (54 Stat. 1137, 1158, 8 U. S. C. § 738) to set aside the naturalization decree and cancel the certificate.[1] The District Court entered a decree for the Government, 47 F. Supp. 622, which the Circuit Court of Appeals for the Eighth Circuit, with one judge dissenting, affirmed. 138 F. 2d 29. We brought the case here because it raises important issues in the proper administration of the law affecting naturalized citizenship. 321 U. S. .

As a condition to receiving his American citizenship, Baumgartner, like every other alien applying for that great gift, was required to declare on oath that he renounced his former allegiance, in this case to the German Reich, and that he would "support and defend the Constitution and laws of the United States of America against all enemies, foreign and domestic"; and that he would "bear true faith and allegiance to the same". That he did not truly and fully renounce his allegiance to Germany and that he did not in fact intend to support the Constitution and laws of the United States and to give them true faith and

[1] Section 338 (a) provides: "It shall be the duty of the United States district attorneys for the respective districts, upon affidavit showing good cause therefor, to institute proceedings in any court specified in subsection (a) of section 310 in the judicial district in which the naturalized citizen may reside at the time of bringing suit, for the purpose of revoking and setting aside the order admitting such person to citizenship and canceling the certificate of naturalization on the ground of fraud or on the ground that such order and certificate of naturalization were illegally procured."

allegiance, are the charges of fraud and illegality on which his citizenship is claimed forfeit.

As is true of the determination of all issues of falsity and fraud, the case depends on its own particular facts. But the division of opinion among the judges below makes manifest that facts do not assess themselves and that the decisive element is the attitude appropriate for judgment of the facts in a case like this. The two lower courts have sustained the Government's claim that expressions by Baumgartner, in conversations with others and in the soliloquies of a diary, showed that he consciously withheld complete renunciation of his allegiance to Germany and entertained reservations in his oath of allegiance to this country, its Constitution and its laws. What follows is a fair summary of the evidence on which this finding rests, putting the Government's case in its most favorable light.

Baumgartner was born in Kiel, Germany, on January 20, 1895, and brought up in modestly comfortable circumstances. He received a classical high-school education, which he completed in time to enter the German army in 1914. He was commissioned a second lieutenant in 1917, and shortly thereafter he was captured by the British and confined in England until November, 1919. Upon his return to Germany, Baumgartner studied at the University of Darmstadt, from which he was graduated in 1925 as an electrical engineer. Thereupon he was employed by a public utility company until January, 1927, when he left for the United States. Shortly before, Baumgartner had married, and his wife followed him to this country later in the same year.

For about three months, Baumgartner stayed with friends in Illinois, and then came to Kansas City, Missouri, where he was employed by the Kansas City Power and Light Company. He continued in its employ down to the time of this suit. The man to whom he reported to work testified that after about two days on the job, Baumgartner began to discuss the political scene in Germany, to express a lack of enthusiasm for the then German Government, and to extol the virtues of Hitler and his movement. Baumgartner spoke so persistently about the superiority of German people, the German schools, and the engineering work of the Germans, that he aroused antagonism among his co-workers and was transferred to a different section of the plant.

There was testimony that in 1933 or 1934 Mrs. Baumgartner's mother visited this country, and that after this visit, Baumgart-

ner, beginning in 1934, "praised the work that Hitler was doing over there in bringing Germany back, on repeated occasions." Evidence of statements made by Baumgartner over a period of about seven years beginning in 1933 indicated oft-repeated admiration for the Nazi Government, comparisons between President Roosevelt and Adolf Hitler which led to conclusions that this country would be better off if run as Hitler ran Germany, "that regimentation, as the Nazis, formed it [sic] was superior to the democracy", and that "the democracy of the United States was a practical farce". One witness of German extraction testified that Baumgartner told him he was "a traitor to my country" because of the witness's condemnation of Hitler. Baumgartner made public speeches on at least three occasions before businessmen's groups, clubs, and the like in which he told of the accomplishments of the Nazi Government and indicated that "he would be glad to live under the regime of Hitler."

During 1937 and 1938, Baumgartner conducted a Sunday school class, and former students testified that the discussion in class turned to Germany very frequently, that Baumgartner indicated that his students could get a fairer picture of conditions in Germany from the German radio, and that Germany was justified in much of what it was doing. The school superintendent also testified that he had received complaints that Baumgartner was preaching Nazism.

In 1938 Baumgartner resigned from the Country Club Congregational Church in Kansas City because he objected to the injection of politics into the sermons. In May of the next year his wife and their three children, who had been born in Kansas City, went to Germany to visit Mrs. Baumgartner's parents. One witness testified that Baumgartner explained this trip in part by saying that "he wanted the children to be brought up in German schools", and when war broke out in September, 1939, Mrs. Baumgartner cabled for money to return but Baumgartner could not raise the necessary funds and felt that his family would be as safe in Germany as here. Baumgartner remarked that he wanted his wife to come back from Germany, when she did, on a German boat. One of Baumgartner's neighbors testified that in a conversation in December, 1939, Baumgartner, asked about his thirteen-year-old daughter then in Germany, said sarcastically: "Edith has done a very un-American thing, she has joined the Nazi Youth Movement."

There was testimony that Baumgartner justified the German invasions in the late 1930's, and announced, when Dunkerque fell, that "Today I am rejoicing." One witness testified that Baumgartner told him that he "belonged to an order called the so-called 'Bund'", and the diary which Baumgartner kept from December 1, 1938, to the summer of 1941 reveals that he attended a meeting of the German Vocational League where the German national anthem was sung and "everyone naturally arose and assumed the usual German stance with the arm extended to give the National Socialist greeting". Other diary entries reflect violent anti-semitism, impatience at the lack of pro-German militancy of German-Americans, and approval of Germans who have not "been Americanized, that is, ruined."[2] Finally, Baumgartner replied in the affirmative to the trial judge's question: "was your attitude towards the principles of the American government in 1932 when you took the oath the same as it has been ever since?"

That the concurrent findings of two lower courts are persuasive proof in support of their judgments is a rule of wisdom in judicial administration. In reaffirming its importance we mean to pay more than lip service. But the rule does not relieve us of the task of examining the foundation for findings in a particular case. The measure of proof requisite to denaturalize a citizen was before this Court in *Schneiderman* v. *United States*, 320 U. S. 118. It was there held that proof to bring about a loss of citizenship must be clear and unequivocal. We cannot escape the conviction that the case made out by the Government lacks that solidity of proof which leaves no troubling doubt in deciding a question of such gravity as is implied in an attempt to reduce a person to the status of alien from that of citizen.

The phrase "finding of fact" may be a summary characterization of complicated factors of varying significance for judgment

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[2] The following are some excerpts from Baumgartner's diary: "The only ones who have any ideas here are the Jews and their ideas are vile, mean, and malicious. . . . Today the President of the United States delivered his message to the new Congress. The speech was a horrible mixture of war agitation and laughable talk about the freedom of press, speech, etc., which this country allegedly has and which has to be protected with guns. . . . we drank a bottle of Pschorr brew together to the welfare and the future of Germany. The Jewish American English fortress in the heart of Central Europe is fallen. A terrible defeat for the above named powers who will probably have a difficult time recovering from this. . . . Listened to Hitler's speech from the Kroll's Opera House on 15.2. It was wonderful as usual. . . . The whole country is under the influence of the insane actions of the Government in Washington which have the character of wild, unbridled despotism."

such a "finding of fact" may be the ultimate judgment on a mass of details involving not merely an assessment of the trustworthiness of witnesses but other appropriate inferences that may be drawn from living testimony which elude print. The conclusiveness of a "finding of fact" depends on the nature of the materials on which the finding is based. The finding even of a so-called "subsidiary fact" may be a more or less difficult process varying according to the simplicity or subtlety of the type of "fact" in controversy. Finding so-called ultimate "facts" more clearly implies the application of standards of law. And so the "finding of fact" even if made by two courts may go beyond the determination that should not be set aside here. Though labeled "finding of fact", it may involve the very basis on which judgment of fallible evidence is to be made. Thus, the conclusion that may appropriately be drawn from the whole mass of evidence is not always the ascertainment of the kind of "fact" that precludes consideration by this Court. See, *e. g.*, *Beyer* v. *LeFevre*, 186 U. S. 114. Particularly is this so where a decision here for review cannot escape broadly social judgments—judgments lying close to opinion regarding the whole nature of our Government and the duties and immunities of citizenship. Deference properly due to the findings of a lower court does not preclude the review here of such judgments. This recognized scope of appellate review is usually differentiated from review of ordinary questions of fact by being called review of a question of law, but that is often not an illuminating test and is never self-executing. Suffice it to say that emphasis on the importance of "clear, unequivocal, and convincing" proof, see *Schneiderman* v. *United States*, *supra* at 125, on which to rest the cancellation of a certificate of naturalization would be lost if the ascertainment by the lower courts whether that exacting standard of proof had been satisfied on the whole record were to be deemed a "fact" of the same order as all other "facts", not open to review here.

The gravamen of the Government's complaint and of the findings and opinions below is that Baumgartner consciously withheld allegiance to the United States and its Constitution and laws; in short, that Baumgartner was guilty of fraud. To prove such intentional misrepresentation evidence calculated to establish only the objective falsity of Baumgartner's oath was adduced. Nothing else was offered to show that Baumgartner was aware

of a conflict between his views and the new political allegiance he assumed. But even if objective falsity as against perjurious falsity of the oath is to be deemed sufficient under §388(a) of the Nationality Act of 1940 to revoke an admission to citizenship, it is our view that the evidence does not measure up to the standard of proof which must be applied to this case.

We come then to a consideration of the evidence in the context in which that evidence is to be judged. Congress alone has been entrusted by the Constitution with the power to give or withhold naturalization and to that end "to establish a uniform Rule of Naturalization". Art. I, § 8, Clause 4. In exercising its power, Congress has authorized the courts to grant American citizenship only if the alien has satisfied the conditions imposed by Congress for naturalization. There is no "right to naturalization unless all statutory requirements are complied with". *United States* v. *Ginsberg*, 243 U. S. 472, 475. And so "If a certificate is procured when the prescribed qualifications have no existence in fact, it may be cancelled by suit." *Tutun* v. *United States*, 270 U. S. 568, 578. From the earliest days of the Republic, Congress has required as a condition of citizenship that the alien renounce his foreign allegiance and swear allegiance to this country and its Constitution. Act of January 29, 1795, 1 Stat. 414. By this requirement Congress has not used meaningless words. Nor, on the other hand, has it thereby expressed a narrow test or formula susceptible of almost mechanical proof, as is true of other prerequisites for naturalization—period of residence, documentation of arrival, requisite number of sponsoring witnesses and the like. Allegiance to this Government and its laws, is a compendious phrase to describe those political and legal institutions that are the enduring features of American political society. We are here dealing with a test expressing a broad conception—a breadth appropriate to the nature of the subject matter, being nothing less than the bonds that tie Americans together in devotion to a common fealty. The spacious scope of this conception was expressed by this Court in stating that the Constitution "was made for an undefined and expanding future, and for a people gathered and to be gathered from many nations and of many tongues". *Hurtado* v. *California*, 110 U. S. 516, 530-31, and again, "when we are dealing with words that also are a constituent act, like the Constitution of the

United States, we must realize that they have called into life a being the development of which could not have been foreseen completely by the most gifted of its begetters. It was enough for them to realize or to hope that they had created an organism; it has taken a century and has cost their successors much sweat and blood to prove that they created a nation. The case before us must be considered in the light of our whole experience and not merely in that of what was said a hundred years ago." *Missouri* v. *Holland*, 252 U. S. 416, 433.

To ascertain fulfilment of a test implying so expansive a reach presents difficult and doubtful problems even for judges presumably well-trained in the meaning of our country's institutions and their demands from its citizens. "Under our Constitution, a naturalized citizen stands on an equal footing with the native citizen in all respects, save that of eligibility to the Presidency." *Luria* v. *United States*, 231 U. S. 9, 22. One of the prerogatives of American citizenship is the right to criticize public men and measures—and that means not only informed and responsible criticism but the freedom to speak foolishly and without moderation. Our trust in the good sense of the people on deliberate reflection goes deep. For such is the contradictoriness of the human mind that the expression of views which may collide with cherished American ideals does not necessarily prove want of devotion to the Nation. It would be foolish to deny that even blatant intolerance toward some of the presuppositions of the democratic faith may not imply rooted disbelief in our system of government.

Forswearing past political allegiance without reservation and full assumption of the obligations of American citizenship are not at all inconsistent with cultural feelings imbedded in childhood and youth.[3] And during a period when new strength of the land of one's nativity was flamboyantly exploited before its full

[3] The retention of cultural ties despite the change in "juridical, and political" status has thus been put by a distinguished historian, Gaetano Salvemini, in speaking of his own naturalization: "There is in this country a wider area of generosity than in any other country—at least in Europe. It is this feeling that one is at home here that conquers you little by little. And one fine day you feel that you are no longer an exile but a citizen in your own country. When I took my oath I felt that really I was performing a grand function. I was throwing away not my intellectual and moral but my juristic past. I threw it away without any regret. The Ethiopian war, the rape of Albania, the Spanish crime, and this last idiotic crime, had really broken my connection with sovereigns, potentates, and all those ugly things which are enumerated in the formula of the oath. It is a wonderful formula. Your pledges are

sinister meaning had been adequately revealed even to some Americans of the oldest lineage, such old cultural loyalty, it is well known, was stimulated into confusion of mind and sometimes to expressions of offensive exuberance.

The denial of application for citizenship because the judicial mind has not been satisfied that the test of allegiance has been met, presents a problem very different from the revocation of the naturalization certificate once admission to the community of American citizenship has been decreed. No doubt the statutory procedure for naturalization (§ 334, Nationality Act of 1940), and § 338, with which we are here concerned, "were designed to afford cumulative protection against fraudulent or illegal naturalization." *United States* v. *Ness*, 245 U. S. 319, 327. But relaxation in the vigor appropriate for scrutinizing the intensity of the allegiance to this country embraced by an applicant before admitting him to citizenship is not to be corrected by meagre standards for disproving such allegiance retrospectively. New relations and new interests flow, once citizenship has been granted. All that should not be undone unless the proof is compelling that that which was granted was obtained in defiance of Congressional authority. Non-fulfilment of specific conditions, like time of residence or the required number of supporting witnesses, are easily established, and when established leave no room for discretion because Congress has left no area of discretion. But where the claim of "illegality" really involves issues of belief or fraud, proof is treacherous and objective judgment, even by the most disciplined minds, precarious. That is why denaturalization on this score calls for weighty proof, especially when the proof of a false or fraudulent oath rests predominantly not upon contemporaneous evidence but is established by later expressions of opinion argumentatively projected, and often through the distorting and self-deluding medium of memory, to an earlier year when qualifications for citizenship were claimed, tested and adjudicated.

It is idle to try to capture and confine the spirit of this requirement of proof within any fixed form of words. The exercise of our judgment is of course not at large. We are fully

only juridical and political. You are asked to sever your connections with the government of your former country, not with the people and the civilization of your former country. And you are asked to give allegiance to the Constitution of your adopted country, that is, to an ideal of life." Radcliffe Quarterly, August 1941, pp. 8-9.

mindful that due observance of the law governing the grant of citizenship to aliens touches the very well-being of the Nation. Nothing that we are now deciding is intended to weaken in the slightest the alertness with which admission to American citizenship should be safeguarded. But we must be equally watchful that citizenship once bestowed should not be in jeopardy nor in fear of exercising its American freedom through a too easy finding that citizenship was disloyally acquired. We have sufficiently indicated the considerations of policy, derived from the traditions of our people, that require solid proof that citizenship was falsely and fraudulently procured. These considerations must guide our judicial judgment. Nor can the duty of exercising a judgment be evaded by the illusory definiteness of any formula.

The insufficiency of the evidence to show that Baumgartner did not renounce his allegiance to Germany in 1932 need not be labored. Whatever German political leanings Baumgartner had in 1932, they were to Hitler and Hitlerism, certainly not to the Weimar Republic. Hitler did not come to power until after Baumgartner forswore his allegiance to the then German nation.

Views attributed to Baumgartner as to the superiority of German people, schools, engineering techniques, and the virtues of Hitler, expressed in 1927, when he began to work in Kansas City, are the only direct evidence introduced to show that before he was naturalized in 1932, his attitude precluded his truly or honestly taking an oath of allegiance to the United States, its Constitution and its laws. And his statement at the trial that his attitude toward the principles of the American Government was the same in 1932 as it was at the time of the trial, is hardly significant. For Baumgartner professed loyalty at the trial, denied or explained the few disturbing statements attributed to him by others, and reconciled suspicious diary entries in ways that do not preclude the validity of his oath of allegiance. In short, the weakness of the proof as to Baumgartner's state of mind at the time he took the oath of allegiance can be removed, if at all, only by a presumption that disqualifying views expressed after naturalization were accurate representations of his views when he took the oath. The logical validity of such a presumption is at best dubious even were the supporting evidence less rhetorical and more conclusive. Baumgartner was certainly not shown to have been a party Nazi, and there is only the statement of one witness that

Baumgartner had told him that he was a member of the Bund, to hint even remotely that Baumgartner was associated with any group for the systematic agitation of Nazi views or views hostile to this Government. On the contrary, Baumgartner's diary, on which the Government mainly relies, reveals that when in 1939 he attended a meeting of the German Vocational League at which the Nazi salute was given, it was apparently his only experience with this group, and he went "Since I wanted to see what sort of an organization this Vocational League was".

And so we conclude that the evidence as to Baumgartner's attitude after 1932 affords insufficient proof that in 1932 he had knowing reservations in forswearing his allegiance to the Weimar Republic and embracing allegiance to this country so as to warrant the infliction of the grave consequences involved in making an alien out of a man ten years after he was admitted to citizenship. The evidence in the record before us is not sufficiently compelling to require that we penalize a naturalized citizen for the expression of silly or even sinister-sounding views which native-born citizens utter with impunity. The judgment must accordingly be reversed and the case remanded to the District Court for further proceedings not inconsistent with this opinion.

*So ordered.*

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Mr. Justice MURPHY.

The issue in this case is clear. The Government has sought to set aside petitioner's naturalization certificate because of alleged fraudulent and illegal procurement. It was thus incumbent on the Government to meet the standard of proof laid down by this Court in *Schneiderman* v. *United States*, 320 U. S. 118, 125, 158, by presenting evidence of a "clear, unequivocal, and convincing" character which did not leave "the issue in doubt" as to whether petitioner fraudulently or illegally procured his certificate.

It is true that in the *Schneiderman* case we were met with the issue as to whether the petitioner in that case had illegally procured his naturalization certificate in that he had not, at the time of his naturalization and five years prior thereto, behaved as a person attached to the principles of the Constitution, and well disposed to the good order and happiness of the United States. We expressly did not pass upon the charge of fraud in obtaining

the certificate, which is the primary charge present in this proceeding. But the requirement that the Government prove its case by "clear, unequivocal, and convincing" evidence transcends the particular ground upon which the Government seeks to set aside the naturalization certificate. The decision in the *Schneiderman* case was not merely a decision of an isolated case. It was a formulation by a majority of the Court of a rule of law governing all denaturalization proceedings.[1] That rule of law is equally applicable whether the citizen against whom the proceeding is brought is a Communist, a Nazi or a follower of any other political faith. This requirement of proof was recognized by the court below, 138 F. 2d 29, 34, and by both the Government and the petitioner before us.

In the instant case the failure of the Government to present evidence of a "clear, unequivocal, and convincing" nature that petitioner fraudulently or illegally procured his naturalization certificate in 1932 is patent. With one unimportant exception, the Government proved only that petitioner displayed certain Nazi sympathies and was critical of the United States several years after 1932. There was no competent evidence that he entertained these strong beliefs or that he had any mental reservations in forswearing his allegiance to the Wiemar Republic in 1932.

American citizenship is not a right granted on a condition subsequent that the naturalized citizen refrain in the future from uttering any remark or adopting an attitude favorable to his original homeland or those there in power, no matter how distasteful such conduct may be to most of us. He is not required to imprison himself in an intellectual or spiritual straightjacket; nor is he obliged to retain a static mental attitude. Moreover, he does not lose the precious right of citizenship because he subsequently dares to criticize his adopted government in vituperative or defamatory terms. It obviously is more difficult to conform to the standard set forth in the *Schneiderman* case by mere proof of a state of mind subsequent to naturalization than by proof of facts existing prior to or at the time of naturalization. But that does

[1] The denaturalization proceeding in the *Schneiderman* case was brought under the provisions of § 15 of the Act of June 29, 1906, 34 Stat. 596, 8 U. S. C. § 405. Practically identical provisions are contained in § 338 of the Nationality Act of 1940, 54 Stat. 1137, 1158, 8 U. S. C. § 738, under which the proceeding in the instant case was instituted. See Schneiderman v. United States, 320 U. S. at 121, note 1.

not excuse a failure to meet that standard. The naturalized citizen has as much right as the natural born citizen to exercise the cherished freedoms of speech, press and religion, and without "clear, unequivocal, and convincing" proof that he did not bear or swear true allegiance to the United States at the time of naturalization he cannot be denaturalized. Proper realization of that principle makes clear the error of setting aside petitioner's naturalization certificate on the basis of the facts adduced in this proceeding.

Mr. Justice BLACK, Mr. Justice DOUGLAS and Mr. Justice RUTLEDGE join in this opinion.